

FEDERAL MAGISTRATES COURT OF AUSTRALIA

IDRIS v MINISTER FOR IMMIGRATION

[2005] FMCA 39

MIGRATION – Appeal from Migration Review Tribunal decision – refusal to grant a spouse visa – criteria for spouse visa – unreasonable decision – procedural fairness – no reviewable error found.

Judiciary Act 1903 (Cth)

Migration Act 1958 (Cth)

Migration Regulations 1994 (Cth), rr. 1.15A, Part 801, Schedule 2

Associated Provincial Picture Houses Ltd v Wednesbury Corp [1948] 1 KB 223

Davis v Minister for Immigration & Multicultural & Indigenous Affairs [2004] FCA 686

Minister for Immigration and Multicultural Affairs v Asif [2000] FCA 228

Minister for Immigration and Multicultural Affairs v Rajalingam (1999) 93 FCR 220

Nassouh v Minister for Immigration and Multicultural Affairs [2000] FCA 788

Navaratne v Minister for Immigration & Multicultural Affairs [1997] 713 FCA

Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002: (2003) 198 ALR 59

Re Minister; ex parte Durairajasingham (2000) 74 ALJR 405

Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme (2003) 201 ALR 327

Applicant: HASSAN SHERIF IDRIS

Respondent: MINISTER FOR IMMIGRATION &
MUTICULTURAL & INDIGENOUS
AFFAIRS

File No: MZ 613 of 2003

Delivered on: 24 January 2005

Delivered at: Melbourne

Hearing date: 23 July 2004

Judgment of: Bennett FM

REPRESENTATION

Counsel for the Applicant: Mr Harris

Counsel for the Respondent: Mr Horan

Solicitors for the Respondent: Australian Government Solicitor

ORDERS

- (1) The application (as amended) be dismissed.
- (i) (2) The applicant pay the respondent's costs of and incidental to these proceedings.

**FEDERAL MAGISTRATES
COURT OF AUSTRALIA AT
MELBOURNE**

MZ 613 of 2004

HASSAN SHERIF IDRIS

Applicant

And

**MINISTER FOR IMMIGRATION & MULTICULTURAL &
INDIGENOUS AFFAIRS**

Respondent

REASONS FOR JUDGMENT

Proceedings

1. By amended application under the *Judiciary Act 1903* (Cth) and the *Migration Act 1958* (Cth) (“the Act”) dated 20 February 2004 (“the application”) the applicant applies for review of the decision of the Migration Review Tribunal (“the MRT” and/or “the Tribunal”) on 9 May 2003 affirming the decision of the respondent’s delegate made on 13 December 2000 refusing to grant the applicant a subclass 801 (Spouse) visa (“the Spouse Visa”).
2. The applicant is a citizen of Eritrea who arrived in Australia on 7 August 1998 as the holder of a Class TO subclass 300 Prospective Marriage (Temporary) visa. The applicant was married to Ms Kheria Adem (“the nominator”) on 16 August 1998.
3. On 31 August 1998, the applicant applied for residence on spouse grounds. This application comprised an application for a Class TK subclass 820 Extended Eligibility (Temporary) visa (“temporary spouse

visa”) and an application for a Class AS subclass 801 General (Residence) visa (“permanent spouse visa”).

4. The applicant was granted a temporary spouse visa on 8 October 1998.
5. On 13 December 2000, a delegate of the respondent refused to grant a permanent spouse visa to the applicant.
6. On 17 July 2001, the Tribunal affirmed the delegate’s decision. This decision was set aside by consent orders made by the Federal Court, and the matter was remitted to the Tribunal for redetermination.
7. As indicated, on 9 May 2003, the Tribunal again affirmed the delegate’s decision. The Tribunal was not satisfied that the applicant was the “spouse” of the nominator within the meaning of reg.1.15A of the *Migration Regulations 1994* (Cth) (“the Regulations”), and therefore he did not satisfy clause 820.221(2)(c) of Schedule 2 of the Regulations.

Grounds of review

8. The applicant submitted that the application before me ought to be granted because:
 - a) The Tribunal made errors of law in construing the criteria that governed the applicant’s entitlement to the Spouse Visa under Part 801 of Schedule 2 of the Regulations, in particular:
 - i) The Tribunal erred in failing to apply the relevant criteria to be met, in particular, whether the applicant and the nominator (the applicant’s wife) had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship between them was genuine and continuing, at the time of decision (i.e. 9 May 2003). It is alleged that the Tribunal’s attention was misdirected to events occurring in the year 2000 period and at around the time of the applicant’s interview with the Department on 1 December 2000;
 - ii) The Tribunal made an error of law in failing to have regard to all of the circumstances of the relationship including in

particular subparagraphs (a) to (d) of sub-regulation 1.15A(3) of the Regulations; and

- iii) The Tribunal erred in failing to apply sub-regulation 1.15A(5) requiring that, if two persons have been living together at the same address for six months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing.
- b) The decision of the Tribunal is so unreasonable that no reasonable decision-maker could have made it in light of:
 - i) the evidence in support of the granting of the Spouse Visa;
 - ii) the lack of evidence to indicate other than at the time at which the decision was to be made, the applicant and his wife had a mutual commitment to a shared life as husband and wife to the exclusion of all others and the relationship between them was genuine and continuing;
 - iii) the decision-maker's reliance on circumstances occurring in the year 2000 period;
 - iv) the fact that evidence favourable to the applicant was unreasonably discounted; and
 - v) alternatively, in circumstances where the Tribunal found that the relationship between the applicant and his wife was not genuine and continuing (by reason of the absence of clear evidence that an intervention process between the applicant and his wife had been in train for some months before the applicant's meeting with the Department on 1 December 2000) the Tribunal's failure to bring to the applicant's attention that critical factor with the consequence that he had no opportunity of dealing with it constituted a breach of the rules of procedural fairness.

Factual background

9. The key facts, dates and events relevant to this application were largely agreed between the parties:

10. The applicant, Mr Hassen Sherif Idris, a male national of Eritrea, was born on 1 March 1967. The applicant stated that he met Kheiria Adem (the nominator), an Australian permanent resident, in Egypt in September 1996. The nominator was born in Eritrea, is now 39 years old and migrated to Australia in 1997. A Prospective Marriage (Temporary) (Class TO) visa was granted to the applicant on 8 July 1998 on the basis that he and the nominator were engaged to marry. It was an arranged marriage.
11. The applicant entered Australia on 7 August 1998.
12. On 16 August 1998, the applicant married his fiancée, the nominator. That marriage has not been dissolved.
13. On 31 August 1998, the applicant applied for permanent residence on spouse grounds (i.e. the Spouse Visa), and a temporary visa.
14. It was not in issue that a permanent Spouse Visa normally cannot be granted until two years have elapsed since the lodgement of the application, at which time the applicant is to show, *inter alia*, that the applicant is the spouse of the nominating spouse. In summary, a person is the spouse of another person if the two persons are in a married relationship, which requires, *inter alia*, the Minister to be, satisfied that: (i) they have a mutual commitment to a shared life as husband and wife to the exclusion of all others; and (ii) the relationship between them is genuine and continuing. The applicant usefully handed up a conformed copy of the relevant regulation on the definition of spouse, reg 1.15A, at the commencement of the hearing.
15. A temporary visa was granted to the applicant on 8 October 1998.
16. After their marriage on 16 August 1998, the applicant and his wife lived together in a rented unit in West Footscray, Melbourne.
17. During the year 2000, the applicant's wife left the marital home and did not live with him again until 2 December 2000. The applicant's wife gave evidence at the hearing to the following effect:

“The nominator stated that she left the visa applicant for about 8 months in 1999 in order to give him some space. She stated that he was confused and shocked by the Australian culture, she was doing everything for him, and she had asked him to pray

more and stop smoking. She said the problem was that she did not understand his confusion ...” [CB183, para 32.]

18. According to the Department’s records, on 22 July 2000 the Department sent the applicant a standard letter requesting evidence that his marital relationship was genuine and continuing.
19. According to the decision record, on 1 August 2000, a friend of the applicant telephoned to inform the Department that the applicant and the nominator had separated about one year ago.
20. The applicant made a statutory declaration on 21 September 2000. He stated, *inter alia*:

“Currently we are not living together but we got the same address due to she make the separate and I did not know where is she - ... it is not a permanent b/c some time she did call me which make it not a permanent. And I wish if she come back. But the separate is not a permanent.”

“We did have a wonderful live together and we did share each other in every thing – As a full time worker – I some time put half the money in her account and in my job all the responsibility if something happen to me – I said everything must go to my wife (her) and I declared for that.”

“As she use to contact me I wish she come back to me as soon as possible b/c I do love her so much Although it is a temporaly separate nothing change my feeling towards her.”

21. On 13 November 2000 the Department told the applicant that it had received information suggesting the spouse relationship was not continuing and invited him to contact the delegate to arrange an interview.
22. On Friday 1 December 2000, the delegate interviewed the visa applicant. The Tribunal summarised the interview as follows:

“According to the delegate’s file note on the Department’s file, the visa applicant stated that the nominator left him about eight to twelve months before the interview, that he only made contact with her on one occasion about two months before the interview when he met her at the university where she was studying, and that he did not know where the nominator resided or her contact number. When asked what led to the separation, the visa

applicant stated that apart from her strict adherence to religion, he did not really know any other reason why she left him. He stated that there are no children of the relationship, that he was not subjected to domestic violence, that he still loves the nominator, and that he had hopes of reconciling with her. The delegate outlined the visa applicant's options, and gave him seven days to either withdraw his application or to let the Department know the nominator's whereabouts; otherwise his application would be refused on the basis that he and the nominator were no longer in a genuine and continuing relationship.” [CB178, para 12.]

23. As to what the delegate told Mr Idris at the interview on 1 December 2000, the delegate's decision record of 13 December 2000 [CB65.] states *inter alia*:

“At the interview I advised Mr Idris what were his options. I gave Mr Idris the option of withdrawing his permanent residence application or the unfavourable outcome of my refusal of his application.” [CB66.]

24. The delegate's file note dated 1 December 2000 [CB61] states *inter alia*:

“I explained to Mr Idris what his options were. I gave Mr Idris 7 days from the date of interview to either withdraw his [sic] or to advise the whereabouts of his spouse. Failing that, I have no choice but to refuse Mr Idris's application based on the fact that he does not meet the requirements for a subclass 801 – spouse visa, namely, that they are no longer in a genuine and continuing relationship ...” [CB61.]

25. After the interview on 1 December 2000, the applicant met and spoke with his wife at the university at which she was studying. On Saturday 2 December 2000 (i.e. the day after the interview with the delegate on 1 December), the applicant and his wife resumed living together at the West Footscray address.

26. On Monday 4 December 2000, the applicant and his wife attended the Department's office together and were interviewed by the delegate. The Tribunal summarised that interview as follows:

“According to the delegate's file note, the nominator stated that she had separated from the visa applicant about eight months previously. When asked for the reason for the separation, she

stated that she was depressed about her mother who she was trying to bring to Australia, and that she could not confide in the visa applicant about any matters. She stated that she returned to the house once per month while the visa applicant was at work to collect the mail and some of her belongings. She stated that she had resumed living with the visa applicant because he had promised to change his ways, that is, to stop smoking and to fast in adherence to the Muslim religion. When asked what would happen if the visa applicant reverted to his old ways, the nominator stated that she would leave him again.” [CB178, para 13.]

27. On 13 December 2000, the delegate refused the applicant’s application on the grounds that the delegate was not satisfied that the marital relationship was genuine and continuing. Consequently, that at the time of the decision, the applicant was not the “spouse” of the nominator within the meaning of reg. 1.15A with the effect that the applicant did not meet the requirements of subclause 801.221(2)(c) and therefore subclause 801.221(2).
28. On 9 January 2001, the applicant lodged an application for review with the MRT and submitted various documents in support.
29. A hearing of the MRT was held on 27 June 2001. On 17 July 2001, the MRT affirmed the delegate’s decision. The decision of the MRT affirming the delegate’s decision was, by consent, set aside and remitted to the MRT by the Federal Court on 21 January 2002.
30. By letter dated 22 July 2002, the MRT invited the applicant to provide the following information to it:

“Evidence of Eritrean social customs and traditional Eritrean values, including:

-the culture, customs, and calendar differences between Eritrea and western culture;

-the cultural, calendar and the Eritrean marriage system in the Eritrean community custom;

-the cultural barriers against promoting one’s own abilities having grown up within a strong culture of displaying humility;

-the manner in which reconciliation takes place in matters of family problems; and

-how the Eritrean culture and tradition deals with reconciliation in the Eritrean community.

Evidence of how your behaviour and that of your sponsor during the development of your relationship correlate with Eritrean social values.” [CB98.]

31. In August 2002, as requested, the applicant submitted various documents to the MRT relating to Eritrean social customs and traditional values as they relate to marriage and the resolution of conflicts in marriage including a letter of Al-Amin Idris, Co-ordinator of Eritrean Community Support [CB132; CB179, para 18.]; a letter and statutory declaration of Omar Jabir Omar, Chairman of the Eritrean Community in Australia Inc [CB110; CB112; CB180, para 19; CB180, para 23.]; a letter of Munira Mahmoud, Settlement Worker with the African Australian Welfare Council of Victoria Inc [CB134; CB180, para 20.]; a letter and statutory declaration of Ghebremedihin Atshebaha, a friend of the couple [CB100; CB102; CB180, paras 21 and 23.]; and a letter of Kamal Sheikldin [CB137; CB180, para 22]. A statutory declaration of Munira Mahmoud dated 18 October 2002 was also provided [CB136.].
32. By letter dated 24 September 2002, the MRT invited the applicant to provide additional information relevant to the review of the delegate’s decision. Various information was provided
33. A hearing of the MRT was held on 22 January 2003. The visa applicant, his wife, Ms Munira Mahmoud and Mr Ghebremedihin Atshebaha gave evidence at the hearing.
34. On 9 May 2003, the MRT affirmed the delegate’s decision of 13 December 2000 refusing to grant the applicant a Spouse Visa.
35. In its reasons for decision, the Tribunal noted that the applicant had provided certain materials in support of the application at various stages, being:
 - c) documents lodged with the MRT on 9 January 2001 accompanying his application for review [CB178-179, para 15];
 - d) an affidavit filed with the Federal Court (in connection with the applicant’s successful 10 August 2001 application to the Federal

Court) stating, *inter alia*, that the MRT had showed very little understanding of the differences between Eritrean and western culture [CB179, para 17];

- e) after the matter was remitted to the MRT by the Federal Court, at the request of the MRT the applicant submitted a number of documents outlining Eritrean social customs and traditional values as they relate to marriage and resolution of conflicts in marriage [CB179, para 18 – CB180, para 23];
- f) various telephone, water, and electricity bills, bank account statements and a photo album [CB181, para 24]; and
- g) pursuant to liberty granted at the hearing, on 28 January 2003 the applicant submitted then current household bills in joint names, together with receipts for payment, a photocopy of a rent card and receipt, and a photocopy of a form under which the applicant specified the nominator as his sole beneficiary under his superannuation scheme [CB185, para 36].

36. In reviewing the relevant criteria to be met, the Tribunal noted, *inter alia*:

- h) There are no criteria to be met at the time of application [CB185, para 39].
- i) The criteria to be met must be met at the time of decision; subclause 801.221(2)(c) requires that the visa applicant is the spouse of the nominator at the time of the Tribunal's decision [CB185, para 39].
- j) As to the definition of the term “spouse” in reg. 1.15A:
 - i) Sub-regulation 1.15A(3) requires the Tribunal to have regard to all of the circumstances of the relationship when forming an opinion whether two persons are in a married relationship. The Tribunal referred to the decision of Katz J in *Nassouh v Minister for Immigration and Multicultural Affairs* [2000] FCA 788 [CB185, para 40]; and
 - ii) Sub-regulation 1.15A(5) provides that if two persons have been living together at the same address for six months or longer, that fact is to be taken to be strong evidence that the relationship is genuine and continuing; however, a

relationship of shorter duration is not to be taken not to be genuine and continuing only for that reason [CB185, para 41].

37. The applicant described aspects of the Tribunal's decision process in the following terms:-

- k) The Tribunal concluded that the applicant did not satisfy the criteria for the Spouse Visa;
- l) The Tribunal dealt with the question "whether the relationship between the visa applicant and the sponsor is genuine and continuing" at CB186, paragraph 43;
- m) The Tribunal made findings on "the question of the nature of the household, the social aspects of the relationship, and the nature of their commitment to each other" [CB186, para 44];
- n) The Tribunal then considered what it described as the "great deal of evidence regarding the nature of the reconciliation process in Eritrean culture ..." [CB186, para 45 to CB187, para 48]; and
- o) The critical parts of the Tribunal's decision are set out in the following paragraphs at CB187:

"The Tribunal notes the clear discrepancy in the evidence of the visa applicant and the nominator regarding the number of occasions on which they were both present during the intervention process. The Tribunal notes that the intervention process had not been successful in the 12 months during which the couple had been separated before the Department interviewed the visa applicant on 1 December 2000. The Tribunal takes into account that during the interview, the Department indicated to the visa applicant that his application was likely to be refused if he was not living with the nominator. The Tribunal places weight on the fact that within one day, the visa applicant met with the nominator, he told her what the Department had said, and she then agreed to resume living with him. The Tribunal might have accepted that the indication from the Department simply acted as a catalyst if there was clear evidence that the intervention process had been in train for some months beforehand. In the absence of that evidence, and even allowing for differences between Eritrean and western culture, the Tribunal is not satisfied that the intervention by community members resulted in the nominator returning to live with the visa applicant."

48. ... The Tribunal does not place much weight on the fact that the visa applicant and the nominator were able to give generally consistent evidence at the hearing concerning their present circumstances, as they have known for over two years that the genuineness of their relationship at the time of decision is the crucial issue in this case. The Tribunal further notes that the visa applicant did not specify the nominator as the sole beneficiary under his superannuation policy until after the most recent hearing.

49. The Tribunal takes into account that the couple has been married for over four years, that they were separated for up to 12 months, and that they have been living together at the same address since at least December 2000 when the nominator returned to live with the visa applicant. The Tribunal accepts that they present themselves to society as a married couple. Despite the presumption in sub regulation 1.15A(5), the Tribunal considers that the totality of the evidence does not support the claimed marital relationship or degree of commitment between the couple.”

38. It was accepted by the respondent that the applicant and his wife have lived together as husband and wife at the West Footscray address since December 2000. The Tribunal did not accept that the common residence of the applicant and the nominator, since December 2000, was evidence that the applicant and the nominator had reconciled a genuine and continuing relationship as at the time of the decision (9 May 2003).

Orders sought by the applicant

39. The orders sought by the applicant are set out in the amended application dated 20 February 2004, namely:
- i) A writ of prohibition prohibiting the respondent from taking action on the decision of the Tribunal made 9 May 2003 to affirm the decision of the respondent's delegate made 13 December 2000 to refuse the applicant a Subclass 801 Spouse Visa.
 - ii) A writ of certiorari quashing the decision or alternatively an order setting aside the decision.

- iii) A declaration that the decision is invalid.
- iv) A writ of mandamus compelling the Tribunal, differently constituted, to reconsider the application according to law.
- v) An order to the Tribunal that the applicant be given reasonable opportunity to furnish up-to-date material to it.
- vi) An order to the Tribunal that it give consideration according to law to all matters to which its decision relates subject to such direction as the Court thinks fit.
- vii) Costs.

40. It was contended by the respondent that, in order to obtain the relief claimed in the amended application, the applicant must demonstrate that the Tribunal's decision was affected by jurisdictional error (i.e. a failure to exercise jurisdiction or an excess of jurisdiction). It was not disputed by the applicant that, in this regard, there are strict limits on the Court's role on judicial review, particularly in relation to findings of fact. The respondent referred to the decision of Kirby J in *Re Minister for Immigration and Multicultural Affairs; ex parte Applicant S20/2002*: (2003) 198 ALR 59 at [114]

“Regardless of the supervisory jurisdiction invoked in a particular case, judicial review is said to be limited to reviewing the legality of administrative action. Such review, ordinarily, does not enter upon a consideration of the factual merits of the individual decision. The grounds of judicial review ought not be used as a basis for a complete re-evaluation of the findings of fact, a reconsideration of the merits of the case or a re-litigation of the arguments that have been ventilated, and that failed, before the person designated as the repository of the decision-making power.”

41. Furthermore, it was contended that, in the context of an application for judicial review, the Tribunal's reasons should receive a beneficial construction, and should not be scrutinised in an overly critical manner “with an eye keenly attuned to the perception of error”.
42. The respondent referred to the fact that the Tribunal was not satisfied that the applicant and the nominator had a mutual commitment to a shared life as husband and wife to the exclusion of others or that the

relationship between them was genuine and continuing, notwithstanding that they had been living together at the same address since at least December 2000 and had presented themselves to society as a married couple. It was contended by the applicant that it is implicit in those findings that the Tribunal did not accept that there had ever been a genuine “reconciliation” between the applicant and the nominator involving the resumption of a spousal relationship within the meaning of the Regulations. The applicant contended that, in reaching this conclusion, the Tribunal placed weight on the timing of the purported “reconciliation”, in that the nominator had resumed living with the applicant within a matter of days after the applicant’s interview with the delegate. The Tribunal considered whether this “reconciliation” had been the result of a process of “intervention” by members of the Eritrean community, but concluded that there was no clear evidence that any such process had begun prior to the “reconciliation”.

43. The respondent contended that, in reaching its findings, the Tribunal referred to the “clear discrepancy” between the evidence of the applicant and the nominator regarding the number of occasions on which they had both been present during the reconciliation process. There were also found to be other inconsistencies in the evidence before the Tribunal relating to the separation and reconciliation of the applicant and the nominator. It was said on behalf of the respondent that, to some extent, the Tribunal’s findings thereby involved an assessment of the credibility of both the applicant and the nominator. Accordingly, the Court should exercise particular caution in reviewing such findings on issues of credibility, which are “the function of the primary decision maker par excellence” (*Re Minister; ex parte Durairajasingham* (2000) 74 ALJR 405 at 417 [67] per McHugh J). The respondent also referred to the decision of the Honourable Justice Tamberlin in *Navaratne v Minister for Immigration & Multicultural Affairs* [1997] 713 FCA (1 August 1997):

“The credibility of an applicant is largely a matter of impression. There is no reason, in principle, why the observations of the High Court in Abalos v Australian Postal Commission (1990) 171 CLR 167 at 179, as to the disadvantage of an appellate body in considering credibility findings should not apply in respect of review applications to this Court under s 476 of the Act. The oft-

cited remarks of the Court as to the “subtle influence of demeanour” are especially important in migration cases where many of an applicant’s assertions must be accepted at face value in the absence of any evidence to the contrary. Inevitably, a great deal must depend on the demeanour as well as the consistency of the evidence of an applicant in testifying as to specific critical facts that are incapable of being independently verified. For these reasons it will often be difficult to persuade this Court on a review application to set aside findings by an administrative decision-maker on credibility questions.”

The Tribunal’s errors as alleged by the applicant

44. The applicant alleges that the Tribunal made jurisdictional errors:
- p) in construing the criteria for a spouse visa;
 - q) in making a decision which was manifestly unreasonable; and
 - r) in reaching its decision in breach of the rules of procedural fairness.

Errors in construing the criteria for a spouse visa

45. The applicant contended that the Tribunal made errors of law in construing the criteria that governed the applicant’s entitlement to the Spouse Visa under Part 801 of Schedule 2 of the Regulations. The applicant alleged that the Tribunal fell into error in construing the criteria for a spouse visa in four respects and as follows:
- s) the Tribunal failed to apply the criteria at the time of the decision;
 - t) the Tribunal failed to properly apply the requirements of sub-reg 1.15A(1A)(b)(i) & (ii);
 - u) the Tribunal failed to have regard to all of the circumstances of the relationship; and
 - v) the Tribunal failed to apply the presumption in sub regulation 1.15A(5).

The applicant’s contention that the Tribunal failed to apply the criteria at the time of the decision

46. It was common ground that there were no criteria to be met by the applicant at the time of his application (31 August 1998). The relevant

criteria must be met at the time of decision which, in this case, was on 9 May 2003. The applicant contended that Tribunal had failed to have regard to the date of decision, 9 May 2003, as the relevant date to assess whether the applicant and the nominator had a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship between them was genuine and continuing.

47. The applicant argued that, although in the Tribunal's reasons it is stated that the criteria must be met by an applicant at the time of decision, it is clear from the face of the reasons that the Tribunal misdirected its attention to events occurring in the year 2000 and at around the time of the applicant's interview with the Department on 1 December 2000. In particular, this is demonstrated by the Tribunal focussing on the couple's separation in 2000; and whether the Tribunal was satisfied that an intervention process with the aim of reconciling the couple had been in train prior to their resuming to live together at the West Footscray address on 2 December 2000. The applicant contended that those events of 2000 occurred over two years prior to the critical time that the MRT was required to direct its attention pursuant to subclause 801.22 of the Regulations, that is, at the time of the MRT's decision on 9 May 2003.
48. The applicant argued that, whilst the Tribunal gave some attention in its reasons to evidence relevant to the couple's relationship as at 2003 (which evidence was characterised by the applicant as being "overwhelmingly supportive of the applicant's application"), the critical matters on which the decision turned concerned the events on or around 1 December 2000 and whether there was "clear evidence" of an intervention process that "had been in train for some months beforehand": The applicant referred to the following extract of the Tribunal's reasoning:

49. *"... The Tribunal notes that the intervention process had not been successful in the 12 months during which the couple had been separated before the Department interviewed the visa applicant on 1 December 2000. The Tribunal takes into account that during the interview, the Department indicated to the visa applicant that his application was likely to be refused if he was*

not living with the nominator. The Tribunal places weight on the fact that within one day, the visa applicant met with the nominator, he told her what the Department had said, and she then agreed to resume living with him. The Tribunal might have accepted that the indication from the Department simply acted as a catalyst if there was clear evidence that the intervention process had been in train for some months beforehand. In the absence of that evidence, and even allowing for differences between Eritrean and western culture, the Tribunal is not satisfied that the intervention by community members resulted in the nominator returning to live with the visa applicant.” [CB187, para 46.]

50. The applicant’s case was that, in making those critical findings, the Tribunal fell into error in misdirecting the inquiry required of it under subclause 801.22 and the clear terms of sub-regulation 1.15A(1A). The respondent contended, however, that there was nothing in the Tribunal’s reasons to indicate that it did not apply the criteria at the time of its decision. In paragraph 39 of its reasons, the Tribunal refers to the criteria required to be satisfied “at the time of decision”. In particular, the Tribunal states that “[p]aragraph (c) of subclause 801.22(2) requires that the visa applicant is the spouse of the nominator at the time of the Tribunal’s decision”. The Tribunal’s ultimate finding at paragraph 50 was in terms directed to the time of decision.
51. The respondent argued that the fact that the Tribunal took into account the events relating to the separation during 2000, and the resumption of co-habitation in December 2000, did not mean that the Tribunal failed to apply the relevant criteria as at the time of its decision. I accept the respondent’s argument that the couple’s separation in 2000 and the circumstances surrounding the purported “reconciliation” were key issues relevant to the credibility of the applicant and the nominator, and were relevant to whether there was a genuine and continuing spousal relationship between them at the time of decision (in May 2003). I find that the Tribunal effectively concluded that, although the applicant and the nominator were living together and presented themselves as a couple, their relationship was not genuine. I accept that finding was open to the Tribunal on the evidence and material before the Tribunal.

The Tribunal failed to properly apply the requirements of sub-regulation 1.15A(1A)(b)(i) & (ii)

52. The applicant contended that the Tribunal failed to properly apply the requirements of sub-regulation 1.15A(1A)(b)(i) & (ii). In paragraph 50 of the reasons, the Tribunal stated [CB188]:

“50. After considering all the relevant evidence and applying the test outlined in Nassouh, the Tribunal is not satisfied at the time of decision the visa applicant and the nominator have a mutual commitment to a shared life as husband and wife to the exclusion of all others, and that the relationship between them is genuine and continuing. Consequently the Tribunal finds that at the time of decision the visa applicant is not the spouse of nominator within the meaning of regulation 1.15A, so he does not meet the requirements of subclause 801.221(2)(c) and therefore subclause 801.221(2).”

53. The applicant contended that it is clear from the findings made by the Tribunal (at CB185-CB188), and paragraph 50 of the reasons (above), that the Tribunal rolled-up the individual parts of the two separate and distinct requirements of sub regulation 1.15A(1A), namely:

- a) that the Minister be satisfied that the couple have a mutual commitment to a shared life as husband and wife to the exclusion of all others (subparagraph (b)(i)); and
- b) that the Minister be satisfied that the relationship between them is genuine and continuing (subparagraph (b)(ii)).

54. The applicant contended that, in failing to separately address the distinct and different requirements of subparagraphs (i) and (ii), the Tribunal erred in construing and failing to apply the relevant criteria to be met by the applicant. On the other hand, the respondent contended that the Tribunal clearly addressed each of the requirements set out in sub-paragraphs 1.15A(1A)(b)(i) and (ii) respectively and that the Tribunal was entitled to express its findings on those requirements in the one sentence. I accept the respondent’s contention that the Tribunal’s reasons are entitled to a fair reading and a beneficial construction. I find that there is no basis for the applicant’s contention that, by expressing its ultimate findings in relation to both requirements

in the one sentence, the Tribunal misconstrued those requirements in a way that involved jurisdictional error.

Failure to have regard to all of the circumstances of the relationship

55. The applicant contended that the Tribunal made an error of law in failing to have regard to all of the circumstances of the relationship at the time of decision, including in particular subparagraphs (a) to (d) of sub-regulation 1.15A(3) of the Regulations. It was put on behalf of the applicant that, under sub-regulation 1.15A(3), the Minister must have regard to all of the circumstances of the relationship in forming an opinion whether two persons are in a married relationship including, in particular:

- (a) *“the financial aspects of the relationship, including:*
 - (i) *any joint ownership of real estate or other major assets; and*
 - (ii) *any joint liabilities; and*
 - (iii) *the existence of any pooling of financial resources, especially in relation to major financial commitments; and*
 - (iv) *whether one party to the relationship owes any legal obligation in respect of the other; and*
 - (v) *the basis of any sharing of day-to-day expenses;*
- (b) *the nature of the household, including;*
 - (i) *any joint responsibility for care and support of children, if any; and*
 - (ii) *the parties’ living arrangements; and*
 - (iii) *any sharing of responsibility for housework;*
- (c) *the social aspects of the relationship, including;*
 - (i) *whether the persons represent themselves to other people as being married or in a de facto relationship with each other;*
 - (ii) *the opinion of the persons’ friends and acquaintances about the nature of the relationship; and*
 - (iii) *any basis on which the persons plan and undertake joint social activities;*

- (d) *the nature of the persons' commitment to each other, including:*
 - (i) *the duration of the relationship; and*
 - (ii) *the length of time which the persons have lived together; and*
 - (iii) *the degree of companionship and emotional support that the persons draw from each other; and*
 - (iv) *whether the persons see the relationship as a long-term one."*

56. The applicant argued that, although the Tribunal's statement of decision and reasons refer to reg. 1.15A, not all of the terms of sub-regulation 1.15A(3) were set out in the reasons. The applicant contended that the Tribunal addressed the financial aspects of the relationship but then sought to address the matters which are the subject of subparagraphs (b), (c) and (d) in a rolled-up way as follows [CB186]:

"44. On the question of the nature of the household, the social aspects of the relationship, and the nature of their commitment to each other, the Tribunal accepts that the couple lived separately and apart for most of 2000. It is not possible to be more specific regarding the length of the separation, because the accounts given of the commencement of the separation vary from August 1999 to April 2000. The Tribunal accepts, however, that the nominator was simply mistaken in her evidence that she left the visa applicant for about 8 months in 1999. The Tribunal notes that when interviewed by the Department on 4 December 2000, the couple stated that the nominator returned to live with the visa applicant on 2 December 2000. The Tribunal accepts this statement as likely to be accurate because it is the account that is most contemporaneous to the event being described."

57. The applicant conceded that paragraphs 45 to 48 of the Tribunal's reasons [CB186-187] were broadly directed to matters within subparagraphs (b) to (d) of sub-regulation 1.15A(3). However, in dealing with these matters in a rolled-up way, it was said that the Tribunal failed to have any or any proper regard to:

- a) any sharing of responsibility for housework (sub regulation 1.15A(3)(b)(iii)); and/or
- b) the degree of companionship and emotional support that the persons draw from each other (sub regulation 1.15A(3)(d)(iii)).

58. The respondent contended that the Tribunal referred to reg. 1.15A(3), and had regard to the factors set out in that sub-regulation as mandatory considerations..

59. I accept the respondent's contention that there is no requirement that the Tribunal make discrete findings on each of the matters set out in reg. 1.15A(3). In this regard the respondent referred to the decision of the Honourable Justice Dowsett in *Davis v Minister for Immigration & Multicultural & Indigenous Affairs* [2004] FCA 686 at [35], where His Honour concluded:

“Although subreg 1.15A(3) requires that the Minister ‘have regard to all the circumstances of the relationship including’ the various matters specified, it does not require that the Tribunal make specific findings concerning any of those matters. To the extent that the material dealt with these matters, the Tribunal appears to have considered them and recorded substantial amounts of the relevant material in its reasons. There is no obligation upon a tribunal of fact to make findings as to whether it accepts or rejects every allegation made in the course of evidence. In some cases allegations may be so fundamental to the ultimate matter for determination that findings concerning them will be essential. In most cases, however, individual facts will be of less significance than the overall effect of the evidence. ... At the end of the day the questions for determination in the present case were whether the Tribunal was satisfied that:

- the applicant and Mr Davis, as at the date of application for a visa, had a mutual commitment to a shared life as husband and wife to the exclusion of all others; and*
- the relationship was genuine and continuing.*

Both questions required an assessment of the subjective state of mind of each party to the marriage. The Tribunal clearly addressed that issue and explained its decision by reference to the evidence. It was obliged to do no more.”

60. In the present case, the applicant contends that the Tribunal failed to have regard to “any sharing of responsibility for housework” (reg. 1.15A(3)(b)(iii)). However, this matter did not appear to be raised or relied on by the applicant before the Tribunal. To the extent that the material before the Tribunal was relevant to this matter, the respondent

relied on various extracts to suggest that there was no sharing of responsibility for housework.

61. Contrary to the applicant's contentions, I find that the Tribunal did have regard to the degree of companionship and emotional support that the persons draw from each other (reg. 1.15A(3)(d)(iii)). The Tribunal expressly acknowledged that the parties had met in 1996 and had been married for over four years (at the time of decision). Furthermore, the Tribunal received evidence from the nominator that, in 2000, she had been unable to discuss matters of extreme concern to her (her mother's migration to Australia) and that, I summarise, that the couple had failed to communicate effectively about the applicant's alleged difficulties in adjusting to Australia. There was also the evidence of the Chairman of The Eritrean Community in Australia Inc. [CB110-111]. and referred to by the Tribunal at paragraph 19 of its reasons, as to the incompatibility of the applicant and the nominator.
62. I accept the contention of the respondent that it is apparent from the Tribunal's reasons as a whole that each of the factors set out in paragraphs (b), (c) and (d) were properly considered. For example, in addition to paragraph 44 [CB186], the Tribunal considers the "social aspects" of the relationship at paragraph 47 [CB187], and aspects of the parties' commitment to each other at paragraph 49 [CB187]. Further, the Tribunal refers to and considers evidence relevant to the opinion of the parties' friends and acquaintances about the nature of the relationship. The evidence concerning the separation and resumption of co-habitation is relevant to the nature of the parties' mutual commitment, including the duration of the relationship, and the length of time during which the persons have lived together.
63. I find that the Tribunal did not commit any jurisdictional error by addressing the factors set out in reg.1.15A(3)(b), (c) and (d) in a "rolled-up way".

Failure to apply the presumption in sub-regulation 1.15A(5)

64. It was contended by the applicant that the Tribunal erred in failing to properly apply the statutory presumption created by sub-regulation 1.15A(5) which requires that if two persons have been living together at the same address for six months or longer, that fact is to be taken to

be strong evidence that the relationship is genuine and continuing. Reference was made to the decision of *Minister for Immigration and Multicultural Affairs v Asif* [2000] FCA 228 in which the Full Court, comprising Drummond, North and Magdwick JJ, stated at paragraph 23:

“In the context of this case, reg. 1.15A(5) is also worthy of note. The respondent married his wife on 4 November 1995. At the date of the initial decision refusing his visa, the marriage had lasted over two years. At the date the Tribunal gave its decision, the date which the Tribunal considered was the relevant one so far as the criteria in par 820.22 are concerned, the marriage had lasted three and a half years. The ordinary approach to fact finding would suggest that the longer a marriage has in fact continued, the more ready will a decision-maker charged with the task of assessing whether it was a genuine one from its outset be to draw that conclusion. It is exactly that approach to proof of the issue in reg 1.15A(1)(b) of genuine and continuing relationship between visa applicant and spouse that is implicit in reg 1.15A(5). This sub-regulation creates something in the nature of a statutory presumption of the existence of a genuine marital relationship between the visa applicant and spouse, where they have cohabited for at least six months: such cohabitation is taken to be "strong evidence" that the relationship is genuine and continuing. This sub-regulation is so worded as to suggest that where the decision-maker has to decide whether a genuine marital relationship existed between a visa applicant and spouse who were together at a particular date, if at the time the question arises for determination the applicant and spouse have been together for six months (or more) that is to be taken as strong evidence that they were in a genuine and continuing relationship at the relevant date. To read this sub-regulation as the respondent would as making six months' (or more) cohabitation strong evidence of a genuine and continuing relationship at a particular date only if the minimum six months' period had already passed by that date involves an unwarranted gloss on what we regard as the clear words of the sub-regulation.”

65. In its reasons, the Tribunal referred to sub-regulation 1.15A(5). At paragraph 49 [CB187] the reasons state:

“49. The Tribunal takes into account that the couple has been married for over four years, that they were separated for up to 12 months, and that they have been living together at the same address since at least December 2000 when the nominator

returned to live with the visa applicant. The Tribunal accepts that they present themselves to society as a married couple. Despite the presumption in sub regulation 1.15A(5), the Tribunal considers that the totality of the evidence does not support the claimed marital relationship or degree of commitment between the couple.”

66. The applicant’s case is that, at the time of the Tribunal’s decision, “the applicant was entitled to the strong presumption provided for in sub-regulation 1.15A(5) that his relationship with his wife was genuine and continuing (see sub-regulation 1.15A(1A)(b)(ii))”. At the time of the Tribunal’s decision on 9 May 2003, the applicant and the nominator had lived together at the West Footscray address for over 30 months.
67. I accept that sub-regulation 1.15A(5) operates upon sub-regulation 1.15A(1A)(b)(ii), that is, the requirement that the Minister must be satisfied that “the relationship between them [i.e. persons in a married relationship] is genuine and continuing”. I accept that requirement must be satisfied at the time of the Tribunal’s decision. I accept that the Tribunal must have regard to all of the period that the couple lived together up to and including the date of its decision. The Tribunal reasoned that *“the Tribunal considers that the totality of the evidence does not support the claimed marital relationship or degree of commitment between the couple”* The applicant argued that the reasons disclose that the Tribunal did not properly apply the “presumption” to the requirement in sub regulation 1.15A(1A)(b)(ii) – that the Minister must be satisfied that “the relationship between them is genuine and continuing”. Rather, that the Tribunal applied the ‘presumption’ to subparagraph 1.15A(1A) generally and/or subparagraphs 1.15A(1A)(b)(i) and (ii).
68. The respondent argued that it is not strictly accurate to describe reg. 1.15A(5) as giving rise to “a presumption”. Sub-regulation 1.15A(5) provides that co-habitation for six months or longer is “taken to be strong evidence” that the relationship is genuine and continuing. I agree that the sub- regulation is not a precise equivalent to a rebuttable presumption of the fact that the relationship is genuine and continuing. That is, I accept that it may be “something in the nature of a statutory presumption” but that is not to say that it is a statutory presumption.

The regulations do not provide that a genuine and continuing relationship can be “presumed” after the affluxion of six months.

69. In my view, the regulations merely clarify that six months of cohabitation is “strong evidence”. The fact remains that that “strong evidence” must be weighed against all other evidence.
70. I find that the Tribunal expressly took into account reg. 1.15A(5), and treated the co-habitation of the applicant and the nominator as “strong evidence” that their relationship was genuine and continuing: see paragraph 41 [CB185.9], paragraph 49 [CB187.9]. However, I also accept that the Tribunal found that this evidence was outweighed by the other evidence. Paragraph 49 of the Tribunal’s decision clearly juxtaposes the evidence of extensive cohabitation with the “*totality of the evidence*”
71. I am mindful of the fact that the Tribunal conducts an inquisitorial process. Most evidence is presented by the applicant. It is not the case that the Crown is a party, as in criminal proceedings, and inferences can be drawn in the event that evidence which is available is not called. It is the Tribunal’s task to weigh all of the evidence adduced and, when it came to examine the relatively lengthy period for which the applicant and the nominator had resided at the same address, it was directed to consider six or more months as constituting “strong evidence” of a genuine and continuing relationship. However, in my view, the Tribunal was not directed to treat it as conclusive evidence or as a presumption in respect of which evidence must be called in rebuttal.
72. It was contended by the applicant that the Tribunal erred in purporting to displace the “presumption” in favour of the applicant by simply stating such displacement was to occur without specific reference to, or identification of, the matters or reasons said to have that effect. It was contended that such identification was necessary in order to ascertain whether that evidence is of such weight, or is sufficiently strong or clear, to rebut the presumption of strong evidence provided for in the regulations. I accept the proposition that a statutory or rebuttable presumption can only be displaced by specific evidence which is identified by the finder of fact. However, I am not satisfied that sub-regulation (5) is such a presumption in the strict sense. It follows that the sum total of the countervailing evidence need only be as strong as

the “strong evidence”, it need not be stronger. In my view, it is clearly accessible from the Tribunal’s reasons that evidence contrary to the couple’s relationship being “genuine and continuing” was found by it in the evidence of the applicant and the nominator about their reconciliation, the evidence about the lack of joint social pursuits and the general nature of the statements of the applicant’s witnesses given in 2002 and 2003. Put another way, the period for which the couple have lived at the same address was a factor to be weighed as “strong evidence” against other evidence but, at the end of the day, the genuine and continuing nature of the relationship was a question of fact for the Tribunal. In this case, I find that there is nothing to indicate that the Tribunal erred in a jurisdictional sense in reaching its conclusion on that question.

The decision of the Tribunal is manifestly unreasonable

73. The applicant argued that the decision of the MRT is so unreasonable that no reasonable decision-maker could have made it (*Re Minister for Immigration and Multicultural Affairs; Ex parte Applicant S20/2002* (2003) 77 ALJR 1165; 198 ALR 59; *Re Minister for Immigration and Multicultural and Indigenous Affairs; Ex parte Palme* (2003) 201 ALR 327) in light of various evidence adduced by or on behalf of the applicant or by the Tribunal.
74. Of the ground of “unreasonableness” (often referred to as ‘Wednesbury unreasonableness’), the respondent observed that it is still unclear whether this ground of review is applicable in relation to decisions to grant or refuse visas under the Migration Act. In any event, I accept the respondent’s argument that, in order to establish Wednesbury unreasonableness, it is necessary to show “something overwhelming” (*Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 230 per Greene MR.) and that this requires far more than mere disagreement with the Tribunal’s reasoning or conclusions. As the Honourable Justice Kenny observed in *Minister for Immigration and Multicultural Affairs v Rajalingam* (1999) 93 FCR 220 at [146]:-

“A tribunal such as the RRT does not commit an error of law merely because it finds facts wrongly or upon a doubtful basis, or because it adopts unsound or questionable reasoning.....I agree that a search by the Court for objective cogency in the

reasons of the RRT creates a real risk that the Court will substitute its own view of the merits of the case for that of the Tribunal.”

75. I find that the Tribunal’s reasoning in the present case is comprehensible, and was based on its assessment of the evidence and material before it. It follows that the Tribunal’s decision cannot be characterised as a decision that was so unreasonable “that it might almost be described as being done in bad faith” or “so absurd that no sensible person could ever dream that it lay within the powers of [the Tribunal]” (*Re Minister for Immigration Multicultural and Indigenous Affairs; ex parte Palme* (2003) 201 ALR 327 at 333 [30] per Gleeson, Gummow and Heydon JJ, quoting *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 229).

The decision of the Tribunal is in breach of the rules of procedural fairness

76. The applicant contended that the Tribunal found that the relationship between the applicant and the nominator was not genuine and continuing by reason of the absence of clear evidence that an intervention process between the applicant and his wife had been in train for some months before the applicant’s meeting with the Department on 1 December 2000 [CB187, para 46] and, furthermore, that the Tribunal did not put to the applicant that, if he was unable to show clear evidence that an intervention process had been in place for some months prior to 1 December 2000, then his application would fail.
77. The applicant contended, at the hearing before the MRT on 22 January 2003, that the member gave the impression that he accepted that there had been attempts to retrieve the marriage prior to 1 December 2000. In the course of the applicant’s evidence, the member stated:

78. *“The Department was very suspicious about the way your reconciliation came about. From their point of view, you did not tell them you were about to reconcile. The Department then says to you there is a chance that your application is going to be refused unless your wife makes contact with the Department. You then tell your wife about this prospect that you might have to leave the country,*

and the very next day your wife comes back to live with you. So looking at it from the Department's point of view, you've been separated about 8 months, there have been on-going attempts to reconcile but no reconciliation takes place until you understand that you might have to leave the country. So the Department thinks this reconciliation is not genuine. It's happened very quickly."

79. Further, in the course of the evidence of the applicant's wife, the member stated:

"From the Department's viewpoint, what they see is that you have been living apart for 8 months, there have been attempts to retrieve the marriage going on during that period, and the day after the Department says to your husband 'we're going to have to refuse your application because you're not living together', the day after that interview, you go back to him."

80. The applicant's case was that the Tribunal's failure to bring to the applicant's attention that critical factor (in the mind of the Tribunal) so that the applicant had an opportunity of dealing with it, was in breach of the rules of procedural fairness constituting a jurisdictional error. Finally, that that error affected the result, or could have done so, and it is appropriate to set aside the Tribunal's decision.
81. The respondent's contention was that the requirements of procedural fairness did not oblige the Tribunal to notify the applicant of its mental processes or to provide the applicant with an opportunity to comment on its provisional views. Rather, the Tribunal was required only to identify to the appellant the "gravamen" or substance of any critical issue on which the decision was likely to turn and which was not apparent from the nature of the power or the terms of the statute, and to advise the appellant of any adverse conclusions which would not obviously be open on the known material. I accept the respondent's contention in this regard.
82. I find that it was made clear to the applicant from both the delegate's decision and at the hearing before the Tribunal that there was an issue about whether the "reconciliation" that took place was genuine, or had been contrived in order to enable the applicant to remain in Australia. It was the applicant's case that reconciliation had been brought about by community intervention. The Tribunal asked the applicant, the

nominator and the other witnesses questions directed to what was involved in the process of intervention from community members, including in particular the number and timing of any meetings with community members. The nominator was asked about the reasons that she decided to return to live with the applicant, particularly in the context of that decision having been immediately after the applicant's interview with the delegate. I find that the applicant could not have been in any doubt that his relationship with the nominator was subject to scrutiny.

83. I accept the respondent's contention that the applicant had a full opportunity to give evidence and to make submissions to the Tribunal on the issue of the quality of his relationship with the nominator. It has not been demonstrated to me that the applicant lost an opportunity to advance his case.

Conclusion

84. In conclusion, I find that what the applicant seeks to attribute to the Tribunal as errors of law or jurisdiction are, in fact, criticisms of the Tribunal for failing to make the findings of fact that the applicant wanted to be made on the evidence. The Tribunal came to its view, as is required by the Act, after having had the benefit of observing the applicant and the nominator and various witnesses give evidence (in 2003) and from reading relevant documentation. The Tribunal formed its assessment of the credibility of the protagonists and probability of the marriage between the applicant and the nominator being genuine and continuing as part of its fact finding function. It is not sufficient that this Court might have taken a different view of the relatively lengthy period for which the applicant and nominator have resided under the one roof and done so regardless of whether the catalyst for the couple to do so was the comments of the delegate (in December 2000) or community intervention aimed at a reconciliation of the couple's relationship or some other factor. This Court is not invested with the same fact finding responsibility or powers as the Tribunal and, in the absence of jurisdictional error, it is not for this Court to interfere with the Tribunal's preference for, or weighing of, the evidence before it.

85. For the reasons set out above, the application should be dismissed with costs. That is, costs of these proceedings in this court. However, I will hear from the parties on the quantum of costs if they are unable to agree on an amount.

I certify that the preceding eighty-three (83) paragraphs are a true copy of the reasons for judgment of Bennett FM

Associate: Jessica Beck

Date: 24 January 2005